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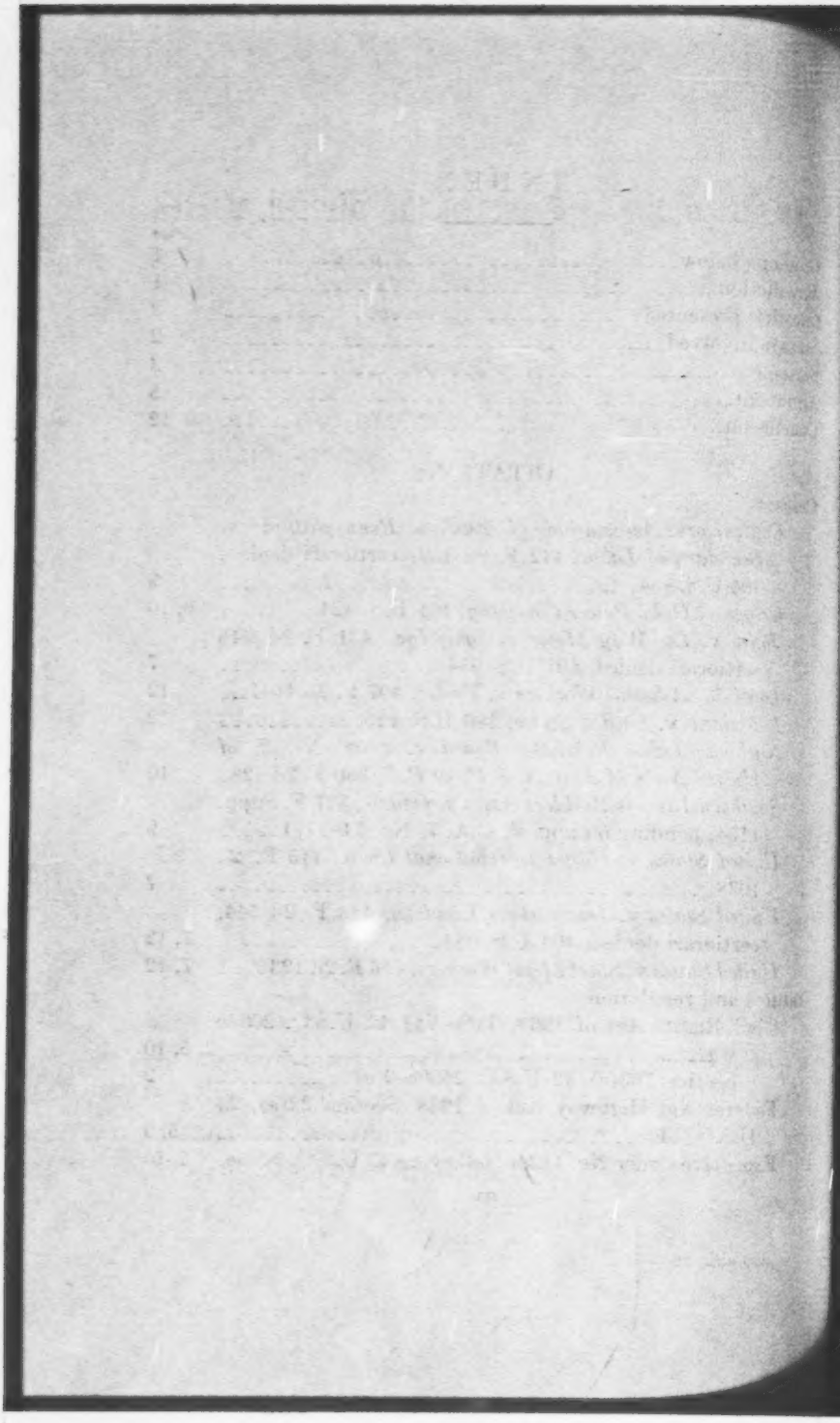

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1685

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 169, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23–41) is reported at 457 F.2d 210. The opinion of the district court (Pet. App. 1–22) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1972, and a timely petition for rehearing *en banc* was denied on February 8, 1972. On April 24, 1972, an order was entered extending the time to file a petition for a writ of certiorari until June 26,

1972. The petition was filed on June 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner union, which had traditionally discriminated against blacks, should be enjoined under Title VII of the Civil Rights Act of 1964 from calculated interference with the hiring of minority trainees pursuant to a voluntary, government-sponsored training program, and required to correct its discriminatory practices.

STATUTE INVOLVED

In addition to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), set forth at Pet. 2–3, also relevant is Section 703(c), 42 U.S.C. 2000e–2(c), which provides in pertinent part:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership [or applicants for membership], or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

STATEMENT[1]

1. Local 169, one of the petitioners herein, operates primarily in East St. Louis, Illinois, and has approximately 550 members, of whom 39 (or 7 percent) are black (Pet. App. 27–28). Blacks compose approximately 69 percent of the population of East St. Louis. Until 1948, Local 169 had no black members. Ten of the black members admitted since 1948 transferred from other carpenter locals (Pet. App. 9, 28). White journeymen members of Local 169 worked more hours for employers covered by the collective bargaining agreement[2] than did black journeymen (Pet. App. 28). The union's referral system is wholly subjective, and the union official in whose discretion was vested the operation of the informal referral procedure had expressed his preference for first referring white

[1] The evidence in the record is largely uncontradicted. Petitioners do not challenge the factual findings made by the district court and recited by the court of appeals.

[2] Based upon union health and pension fund records, it appears that white journeymen averaged 17% more hours worked than did black journeymen. The petitioners submitted no contrary evidence, but attacked the figures as being incomplete, since they did not reflect hours worked for other employers, such as municipal governments (see Pet. 15–16; Pet. App. 10, 28). There was, however, no evidence that proportionately more black members were self-employed, or employed by municipalities; in any event, the pension records reflected the work under the jurisdiction of the union which was the only matter in issue.

members of the union to jobs (see Pet. App. 29). In addition, black carpenters who sought "work permits" (which would enable them to obtain work from employers covered by the collective bargaining agreement) were repeatedly refused such permits because of the union's racially discriminatory policy in the issuance of work permits (see Pet. App. 30).

Although the Joint Apprenticeship Committee of the Tri-Counties Carpenters Council (which included Locals 169 and 480) had operated an apprenticeship program for many years, no black apprentice had ever graduated from the program to become a journeyman carpenter (Pet. App. 39). Local 169 had ostensibly selected sixteen blacks as apprentices (out of a class of 41) in 1970 before suit was filed, but none of them had been referred for work, nor had any begun their classroom instruction until this suit had started (Pet. App. 39; see, also, Pet. 18).

In the winter of 1969, in an effort to open the highway construction industry to minority persons in the East St. Louis area and to thaw a freeze of federal highway funds, the office of the Governor of Illinois, after extensive negotiations among local representatives of contractors, unions, the minority community, and appropriate federal agencies, drafted "An Agreement to Facilitate Equal Employment Opportunity in State Highway Construction in Madison and St. Clair Counties," commonly known as the Ogilvie Plan. After further negotiations and redrafting, the Plan was promulgated on June 3, 1970, and was signed by the contractors, the minority representatives, and two locals of the Teamsters union. The Laborers union

acquiesced in its implementation, and pursuant to consent decrees entered in suits brought by the United States, the cement finishers, ironworkers and operating engineers unions agreed to cooperate with the Plan. Although the carpenters union had initially agreed to cooperate with the Plan, it later announced its opposition.

The Plan contemplated a training program of up to 12 weeks and, upon successful completion of that course, a period of up to 200 days (approximately one construction year) of on-the-job training for those who were not yet up to journeyman skills, with pay at rates comparable to apprentices (Pet. App. 32).

When the first 15 black trainees graduated from the 12-week program on November 13, 1970, a contractor requested referral of a trainee from Local 169's union hall, and the trainees requested "permits." When the business agent, petitioner Rainbolt, refused both requests, the contractor hired two of the trainees. Although the collective bargaining agreement gave the employer sole discretion to hire anyone, the carpenters promptly walked off the job. Local 169 took several measures to insure that its men stayed off the job, and that no other workers went there (Pet. App. 32–34).

2. The present suit was brought by the Attorney General on behalf of the United States on November 25, 1970, alleging violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), and for interference with implementation of Executive Order 11246 and Section 22(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C. 140) requiring equal employment opportunities on federally assisted highway con-

struction projects. Defendants were Tri-County Illinois Carpenters District Council, Carpenters Local 169 and Carpenters Local 480, and their respective business agents (hereinafter "petitioners"). The complaint alleged that petitioners had engaged in a pattern or practice of discrimination against blacks with respect to union membership and employment opportunities (Pet. App. 1–4), and that petitioners had failed to cooperate with the implementation of the Ogilvie Plan and had engaged in a strike when black Ogilvie Plan trainees were hired by contractors (Pet. App. 4–5).

The district court issued a temporary restraining order enjoining petitioners from interfering with the Ogilvie Plan. After a hearing on the merits, the district court concluded that there was insufficient evidence to find that petitioners had engaged in racial discrimination, although it did find that several blacks had been denied membership and referral. The court also concluded that petitioners' interference with the Ogilvie Plan was not racially motivated (Pet. App. 20–21). Similarly, it found that, although petitioners operated a highly subjective and unreviewable referral system, and nepotism played a role in its operations, these practices were not racially motivated and therefore not unlawful under Title VII (Pet. App. 10–11).

3. The court of appeals unanimously reversed. Relying upon *Griggs* v. *Duke Power Company*, 401 U.S. 424, 432, the court of appeals held that the district court had erred in relying upon motive as the criterion for determining violations of Title VII (Pet. App.

30–31). The court found ample and undisputed evidence of racially discriminatory practices by petitioners in admissions to membership and issuance of permits, nepotistic practices, which in view of the small number of black members tended to limit the percentage of black members, and a referral system, which in view of the business agent's stated racial preference was likely to produce discrimination. Moreover, the racial statistics established a *prima facie* case of racial discrimination.[2] (Pet. App. 28–31.)

The court of appeals also ruled that the district court clearly erred in finding petitioners' opposition to the Ogilvie Plan to be "union versus non-union, but definitely not" racially motivated (Pet. App. 36). The court rejected petitioners' allegations that their opposition to the Ogilvie Plan was motivated by their desire to protect their apprenticeship program and that they willingly took blacks into their apprenticeship program. The court observed that no black apprentice had ever graduated from the apprenticeship program, which contained difficult "barriers" to admission and required a four-year period of apprenticeship during which the applicant must attend school for two nights a week. Moreover, between 1960 and 1970, Locals 169

[2] Use of statistics to establish racial discrimination in employment cases is well-settled, and has been approved by each appellate court that has considered the matter. *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 553 (C.A. 9), certiorari denied, 404 U.S. 984; *United States* v. *Sheet Metal Workers*, 416 F. 2d 123 (C.A. 8); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954; *United States* v. *Hayes International Corp.*, 415 F. 2d 1038 (C.A. 5).

and 480 admitted 62 members who had no apprenticeship training and less than four years prior of experience. Only three of these were black (Pet. App. 40–41). On this record the court of appeals held (Pet. App. 40):

> Defendants made the argument that the question was not white versus black, but was "which blacks." The record shows that the Union was instead trying to control "how many blacks." This it cannot do under the 1964 Civil Rights Act.

The court of appeals directed the district court to fashion appropriate affirmative relief, which is to include a permanent injunction prohibiting racial discrimination and specifically prohibiting interference with the rights of black persons to work in the carpentry trade. The district court's decree is to include a prohibition against the unions and their members from engaging in or encouraging interference with the implementation of the Ogilvie Plan, and a direction to issue permits to black persons trained pursuant to the Ogilvie Plan (Pet. App. 40–41).[4]

ARGUMENT

Petitioners' principal contention is that the court of appeals improperly held that "one can be found guilty of engaging in a pattern or practice of racial discrimination solely because he refuses to cooperate with a pet voluntary plan to which is is not" a party (Pet. 30). The de-

[4] The court of appeals also directed the district court to "consider the requirement of improvements in the hiring hall referral system, possibly on a first-in, first-out basis" (Pet. App. 40–41).

cision below did not, however, rest "solely" upon petitioners' refusal "to cooperate with a pet voluntary plan".

a. The Ogilvie Plan was adopted pursuant to the provisions of the Federal Highway Act of 1968. The Act provides that the Secretary of Transportation, prior to the approval of any projects under the Act, shall "require assurances from any State desiring to avail itself of the benefits of this chapter that employment in connection with proposed projects will be provided without regard to race, color, creed and national origin." The Act further provides that where the Secretary considers it necessary to assure equal employment opportunity he shall "require certification by any State desiring to avail itself of the benefits * * * that there are in existence and available on a regional, statewide, or local basis, apprenticeship, skill improvement or other upgrading programs * * * which provide equal opportunity for training and employment without regard to race, color, creed or national origin" (23 U.S.C. 140(a)). The Ogilvie Plan was adopted to provide this assurance to the Secretary of Transportation that employment in connection with proposed projects under the Act would be provided on a non-discriminatory basis.[5]

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[5] The lawfulness of the Ogilvie Plan itself is not challenged. The lawfulness of similar plans has been upheld. *E.g.*, *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854. The lawfulness of the Ogilvie Plan itself was sustained by another district court in a separate proceeding. *Southern Illinois Builders Ass'n* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill), pending on appeal, C.A. 7, No. 71-1771.

b. Petitioners did not simply fail to cooperate with the Ogilvie Plan. They engaged in unlawful economic coercion [6] in an effort to compel employers, who were willing participants in a plan that satisfied their obligation under Executive Order 11246,[7] not to comply with their commitments under the Plan. Moreover, the decision below was not based "solely" upon petitioners' unlawful strike activity. The court of appeals viewed that activity in the context of a pervasive and detailed pattern of discriminatory practices engaged in by Local 169.[8] Indeed, the court of appeals here found that the strike was racially motivated (Pet. App. 32–33).[9] Petitioners do not argue that the standards employed by the court of appeals were contrary to well established principles. They acknowledge "that policies and practices racially neu-

---

[6] Since petitioners had by collective bargaining agreement vested in the employers the right to hire without regard to union membership or referral, and had agreed not to strike, but to settle all grievances by arbitration (Pet. App. 33), it is difficult to envision any theory under which the strike could be deemed a lawful one. See *National Labor Relations Board* v. *Local No. 2 of United Ass'n. of J. & A. of P. & P. I.*, 360 F. 2d 428 (C.A. 2).

[7] Executive Order 11246 requires contractors to take affirmative action in regard to equal opportunity employment, upgrading, recruitment and selection for training, including apprenticeship.

[8] This case, therefore, does not present the question whether a union which had conducted its affairs in compliance with Title VII could lawfully strike to prevent implementation of such a plan.

[9] Racial motivation is not, of course, a necessary component in a Title VII case, since Congress directed the thrust of the Act to the consequences of employment practices, not the motivation. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432.

tral on there face are, nevertheless, unlawful if they tend to perpetuate effects of past discrimination," that "[e]vidence of pre-act (Civil Rights Act of 1964) conduct is admissible to attempt to prove that present policies perpetuate the effects of past discrimination," and that "[p]reference in work referrals or in union membership to relatives of members of a union which has only white members may constitute a violation of the Act" (Pet. 23–25).

Petitioners, however, appear to suggest that they are not responsible for discrimination in hiring because they do not control employer hiring practices through the use of "an exclusive hiring hall where hiring could only be had through the union," (Pet. 25). But the record indicates that in practice Local 169 controlled employer hiring practices just as effectively as if it had a "hiring hall". As the court of appeals found (Pet. App. 3–8):

> * * * Where, as here, the union members refuse to work with nonmembers who are working without union approval, the union in fact exerts effective control over employment in the trade by controlling membership and issuance of permits, notwithstanding contractual provisions purportedly permitting employment without regard for union membership or approval.

Thus, by control over hiring and by discriminatory admission practices, detailed earlier and in the opinion below, Local 169 deprived minority group members of the right to earn a livelihood as carpenters in the East St. Louis Area. The unlawful strike that precipitated the present action was another effort to limit minority access to employment. In order to prevent further

discrimination and to eliminate the consequence of past discrimination, therefore, the court of appeals correctly directed the district court to enjoin petitioners' interference with the Ogilvie Plan and to require them to issue work permits to persons trained pursuant to the Ogilvie Plan and to all other black carpenters hired by employers in the same manner as they issue permits to whites. That such affirmative relief is appropriate is well established in this area. See *Louisiana* v. *United States*, 380 U.S. 145, 154; *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553 (C.A. 9), certiorari denied, 404 U.S. 984; *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123, 131 (C.A. 8); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1052–1053 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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August 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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71-1686

In The

Supreme Court of the United States

October Term, 1971

No. _____

JAMES BROWN HARDY,
ACTING WARDEN OF THE MARYLAND STATE PENITENTIARY,
Petitioner,

v.

MILAN M. VUITCH, M.D.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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